Filed 8/19/19 P. v. Colunga CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE RAMON COLUNGA, Defendant and Appellant.	B289117 (Los Angeles County Super. Ct. No. BA423055)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred Wapner, Judge. Affirmed as modified.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, David E. Madeo and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jose Ramon Colunga (Colunga) guilty of, among other crimes, two counts of oral copulation or sexual penetration of a child 10 years old or younger. On appeal, Colunga contends there are errors in his sentence and in the award of custody credits. He also requests that we conduct a *Pitchess*[1] review and remand the matter for a hearing on his ability to pay fines and assessments, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We modify the judgment to correct the award of custody credits but otherwise affirm the judgment.

BACKGROUND

I. Colunga's sexual abuse of the child

The child lived with Colunga from the time she was a baby until she was 12. During that time, she mistakenly thought he was her biological father. Colunga began sexually abusing the child when she was seven years old. The abuse continued for several years until she eventually reported it when she was in middle school, describing how Colunga repeatedly forced her to orally copulate him, put his fingers and his penis into her vagina, touched her breasts and vagina, and sodomized her.

When the child finally reported the abuse, her clothes were taken by investigators, and forensic testing of the child's underwear revealed the presence of Colunga's sperm.

Colunga confessed his crimes to detectives. However, he attempted to minimize his conduct by explaining that the child

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

"started it" when they were playing, and the "intimacy" escalated.[2]

II. Verdict and sentence

The jury found Colunga guilty of two counts of oral copulation or sexual penetration of a child 10 years old or younger (Pen. Code, § 288.7, subd. (b); counts 2 & 3),[3] continuous sexual abuse (§ 288.5, subd. (a); count 5), and lewd act on a child (§ 288, subd. (a); count 6). On March 28, 2018, the trial court sentenced Colunga to consecutive terms of 15 years to life on count 2, 15 years to life on count 3, the upper term of 16 years on count 5, and the upper term of eight years on count 6, for a total of 24 years, determinate, plus 30 years to life. The trial court imposed fines and assessments.[4]

DISCUSSION

I. Imposition of consecutive sentences and upper terms

Colunga contends that the trial court abused its discretion by imposing consecutive sentences on counts 2 and 3 and the upper terms on counts 5 and 6. We reject this contention, first, because Colunga did not object at the time of sentencing. Where, as here, the appellant complains about the manner in which the trial court exercised its sentencing discretion and articulated its supporting reasons, such a complaint may not be raised for the

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[2] Colunga retracted his confession at trial.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

[4] The trial court also imposed a sex offender fine (§ 290.3) but it is not at issue.

first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1101.) The issue is therefore forfeited.

Second, and even if not forfeited, the applicable abuse of discretion standard of review compels affirmance. (See generally *People v. Clancey* (2013) 56 Cal.4th 562, 579 [imposition of consecutive sentences and upper term reviewed for abuse of discretion].) A sentencing court abuses its discretion only when its decision is so irrational or arbitrary no rational person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) In exercising its discretion to impose a sentence, the court may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. (Cal. Rules of Court, rule 4.420(b).) A sentencing court may not rely on the same aggravating factor to impose a consecutive sentence and an upper term. (Cal. Rules of Court, rule 4.425(b)(1); *People v. Sperling*, *supra*, 12 Cal.App.5th at p. 1104.)

At sentencing, the trial court explained that the "nature of the acts" convinced it that the sentences should be consecutive. As to the upper terms, the trial court, adopting the words Colunga used to describe the allegations against him when he denied abusing the child, noted that the conduct occurred over a period of years and was "something horrible and terrifying," "dirty," and "embarrassing." The trial court also noted that Colunga had confessed to the crimes but then testified at trial that his confession had been coerced. The upper terms were therefore justified because Colunga "didn't have to testify; but if [he] testified, [he did not] have a right to lie about it." Further, the trial court considered the impact of the crimes on the child's life. "And this notion that [Colunga] just couldn't help [him]self

because [the child] was so attractive, she was seven when this started. She was a little girl. [The court had] the picture of her in her Elmo sweatshirt."

We do not agree with Colunga that the trial court, when it referred to the "nature of the acts," improperly used the elements of the offenses to justify imposing consecutive sentences. Rather, the trial court, using Colunga's own words—dirty, terrible, horrible—aptly characterized Colunga's conduct. Properly understood, the trial court was referring to the high degree of cruelty, viciousness or callousness Colunga exhibited in committing his crimes. (Cal. Rules of Court, rule 4.421(a)(1).)

Next, the trial court cited multiple reasons for imposing the upper terms. Among them was that Colunga ruined the child's life—an apparent reference in part to her problems managing her anger and her tendencies toward violent and suicidal behavior (she cut herself). Further, the trial court noted that the abuse began when the child was very young, just seven years old. In referring to the child's youth, the trial court was not relying on her age as an aggravating factor. (See *People v. Ginese* (1981) 121 Cal.App.3d 468, 477 [age is inappropriate aggravating factor when age is element of offense].) Rather, the child was particularly vulnerable because of her circumstances. Her youth was just part of the total milieu in which the crimes occurred. (See *People v. Price* (1984) 151 Cal.App.3d 803, 814.) That is, Colunga was, for all intents and purposes, the child's father. As such, he took advantage of his position of trust to abuse her and to ensure her silence. (See Cal. Rules of Court, rule 4.421(a)(11).) Indeed, the child testified that she was afraid to say anything because she didn't want to be separated from her family and

because Colunga told her that she would be beaten by her mother if she ever told.

Even if we attributed imprecision to the trial court's choice of words at sentencing, we would not find prejudicial error. A trial court's isolated or ambiguous remarks do not overcome the presumption that its judgment rests on legitimate sentencing objectives. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 835.) At the outset of sentencing, the trial court told the parties it would take the "mystery" out of the proceedings and immediately pronounced its intent to impose the maximum sentence. It is therefore not reasonably probable the trial court would have chosen a lesser sentence had it known some of its reasons were improper. (See *People v. Jones* (2009) 178 Cal.App.4th 853, 861.)

We also reject Colunga's argument that the parties' sentencing memoranda misled the trial court into believing that consecutive sentences were mandatory. To the contrary, the trial court's comments at sentencing establish it was fully aware of its discretionary powers.

Because we have found no error in the sentence imposed, we reject Colunga's related ineffective assistance of counsel contention. (See generally *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Brown* (2014) 59 Cal.4th 86, 109.)

II. *Pitchess* review

Before trial, Colunga filed three motions or supplemental motions seeking discovery of Detective Claudia Garcia's personnel records,[5] under *Pitchess*, *supra*, 11 Cal.3d 531. The trial court granted all three motions and held three in camera

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[5] Detective Garcia was present when Colunga confessed.

hearings. After each hearing, the trial court ordered disclosures. Colunga now asks that we review the sealed transcripts of the trial court's *Pitchess* hearings to determine whether the court abused its discretion by failing to order disclosure. We have reviewed the sealed transcripts of the in-camera hearings. The transcripts constitute adequate records of the trial court's review and reveal no abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1232.)

III. Custody credits

The trial court awarded Colunga 1,462 days of presentence custody credits. However, Colunga contends, the People concede, and we agree that Colunga is entitled to one additional day of presentence custody credit, for a total of 1,463 days.

IV. Ability to pay hearing

The trial court imposed a $300 restitution fine under section 1202.4, subdivision (b), a $160 court operations assessment under section 1465.8, and a $120 court facilities assessment under Government Code section 70373. The trial court also imposed but stayed a $300 parole revocation fine. Under recent authority holding that such assessments and fines may not be imposed absent evidence of the defendant's ability to pay them, Colunga contends that the matter must be remanded so that the trial court can conduct an ability to pay hearing. (*Dueñas*, *supra*, 30 Cal.App.5th 1157.)[6] Unlike the defendant in *Dueñas*, Colunga did not object below to the assessments on the ground of his inability to pay and made no showing of indigence.

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[6] *Dueñas* did not address parole revocation fines under section 1202.45.

Generally, where a defendant has failed to object to a restitution fine based on an inability to pay, the issue is forfeited on appeal. (See *People v. Avila* (2009) 46 Cal.4th 680, 729.) Respectfully, we agree with our colleagues in Division Eight that this general rule applies here. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455; *People v. Frandsen* (2019) 33 Cal.App.5th 1126; but see *People v. Castellano* (2019) 33 Cal.App.5th 485 [Division Seven].)

Further, we agree with our colleagues in the First District that not all defendants are similarly situated to Dueñas, whose cerebral palsy rendered her unable to work and whose inability to pay fines and fees was directly related to her poverty. (See *People v. Johnson* (2019) 35 Cal.App.5th 134.) Here, there was no evidence that Colunga lacked income-earning capacity. Instead, the record suggests that he helped to support the household. Also, Colunga is serving a determinate term of 24 years, followed by an indeterminate term of 30 years to life. Even if we assumed that Colunga suffered a due process violation when the trial court imposed a modest financial burden on him without taking his ability to pay into account, he has ample time to pay it from a readily available source of income while incarcerated, i.e., prison wages. (See *id.* at p. 104.) The error is harmless beyond a reasonable doubt.

DISPOSITION

Colunga is awarded 1,463 days of presentence custody credits. The clerk of the Superior Court is directed to modify the abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

NOT TO BE PUBLISHED.

DHANIDINA, J.

I concur:

EDMON, P. J.

LAVIN, J., Concurring:

I agree with the majority's conclusion that the court did not abuse its discretion by imposing consecutive sentences for counts 2 and 3 and upper terms for counts 5 and 6. I also agree that the court did not abuse its discretion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and that Colunga is entitled to an additional day of custody credit.

I respectfully disagree with the majority's conclusion that Colunga forfeited any challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code,[1] § 1465.8), and the restitution fine (§ 1202.4, subd. (b)) by failing to object in the trial court. *People v. Dueñas*, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172.) No one saw it coming—and Colunga was not required to anticipate it. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 137–138; see *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence' "].) On the merits, however, I conclude no error occurred because the court impliedly found Colunga had the ability to pay the disputed fine and fees. I therefore concur.

When a defendant is convicted of a sex crime listed in section 290, subdivision (c), the court must impose a fine under section 290.3 unless it "determines that the defendant does not

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[1] All undesignated statutory references are to the Penal Code.

have the ability to pay" it. (§ 290.3, subd. (a).) The fine is $300 for the first offense and $500 for each subsequent offense. (*Ibid.*) It applies per count rather than per case. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 822.) Thus, as Colunga was convicted of four eligible sex offenses, the court was required to impose one $300 fine and three $500 fines.

Instead, the court imposed a single $300 sex offender fine under section 290.3. On a silent record, the failure to impose all required sex offender fines implies a finding that the defendant lacks the ability to pay the fines the court did not impose. (*People v. Stewart* (2004) 117 Cal.App.4th 907, 911.) That is, by ordering Colunga to pay $300 rather than $800, $1300, or $1800, the court impliedly found that Colunga could pay $300 in fines but could not pay more than that.

A defendant's ability to pay fines and fees is evaluated in light of his total financial obligations. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) Total financial obligations include the conviction assessment (Gov. Code, § 70373), the operations assessment (§ 1465.8) and the restitution fine (§ 1202.4). (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531–1532.) I presume the court accounted for these obligations when it concluded Colunga could pay the $300 sex offender fine but could not pay the other required sex offender fines. (*Ibid.*)

As the court below has already made an ability to pay determination, there is no need to remand for the hearing Colunga requests.

LAVIN, J.